No. 14584

United States Court of Appeals

For the Ninth Circuit

LOUIS GOLD, doing business as the GOLD DESK AND SAFE COMPANY,
Appellant,

vs.

H. M. GERSON, Trustee in Bankruptcy of the Estate of ROBERT STEINBERG, doing business as PACIFIC LITHO-ART COMPANY, AMALGAMATED CREDITORS EXCHANGE and JERRY'S MARKET, Bankrupt,
Appellee.

Appellant's Reply Brief

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Appellant's Reply Brief

In this reply brief, we hope to point out the numerous errors and misstatements contained in the brief of the Appellee.

I.

THE THREE $100 PAYMENTS RECEIVED BY THE APPELLANT WERE NOT CREDITED TO THE OPEN CHARGE ACCOUNT OF THE BANKRUPT.

It seems, from Appellee's brief, that his entire case is built around the cry that the $300.00 paid by the Bankrupt was credited to an open account. On pages

2, 5, 9, 10, and 11 of Appellee's brief, it is stated that the Appellant's testimony indicates that the payments were credited to an open account. *This is untrue.* It is true that at the time of the purchase of the personal property in question, the Bankrupt had an open charge account with the Appellant, on which there remained a balance of $159.00 (transcript record p. 69). There was no entry on the books of the purchases involved in this action; nor was there any entry of the trade-in credit for the bankrupt's old furniture (Appellant's Exh. 2). No statements were sent to the Bankrupt on this particular deal (transcript record p. 70). The three $100.00 payments received by the Appellant could not have been credited to something that had not been charged on the books. Under no possible stretch of the imagination can it be said that said payments were credited to the Bankrupt's open charge account (transcript record p. 68).

The checks sent by the Bankrupt were marked "on account". *This does not mean the open charge account,* as has been implied by Appellee. It was to be applied on account of the specific purchase of the personal property in question (transcript record p. 52). The book transaction has a simple explanation. The checks were recorded on the books to be credited to this particular purchase when the prices and the correct charges would be ascertained (transcript record p. 68). The fact that the checks may have been marked "on account", does not prove that the purchase was on an open charge account, wherein title would pass to the buyer.

The testimony of the Bankrupt discloses that the furniture was purchased on the basis of extended payments at the rate of $100.00 per month (transcript record p. 45), and that he marked the checks "on account". There is not one iota of evidence in the record that substantiates Appellee's contention that the purchase so made was on an open charge account, and not on the extended payment plan. If such contention was the fact, the bill would have been due and payable in 30, 60 or 90 days, which is the general rule in open charge accounts.

II.

SAID PERSONAL PROPERTY WAS NOT SOLD ON OPEN ACCOUNT, AND IT WAS THE INTENTION OF THE PARTIES THAT TITLE SHOULD NOT PASS TO BUYER.

On page 11 of Appellee's brief, he raises the point that the furniture in question was sold on open account, and that the intention of the parties was that title should pass to the Bankrupt. He further states that the terms of the sale were clearly entered into insofar as the price and the transfer of title were concerned.

On these statements there is no reference to the transcript of record. Why has counsel for Appellee failed to make such a reference? *Because there is no evidence in the record to substantiate these bizarre allegations.*

According to the bankrupt's own testimony, there was no definite purchase prices mentioned at the time

of the delivery of the merchandise (transcript record p. 51). The parties were to get together at a later date to determine the exact amount of the purchase price, the amount of the trade-in allowance and the preparation of the necessary papers (transcript record p. 52). During the pendency of these and other adjustments, the bankrupt agreed to send in $100.00 (transcript record p. 52).

To contend that here was an unconditional contract to sell specific goods, passing title to the buyer, is an absurdity.

III.

THE INVOICES AS EXECUTED BY THE BANKRUPT, CONSTITUTED A TITLE RETENTION AGREEMENT.

The fact that the same invoices may be used as delivery receipts and invoices by the Appellant for cash and credit sales, has no bearing on the issues of this case. We admit that an invoice, standing alone, does not constitute a contract. Appellee seems or wants to lose sight of the fact that what we have here are three separate writings contained on one document, to-wit:

1. An invoice of the merchandise delivered.
2. A receipt for the merchandise so delivered and signed by the Bankrupt.
3. An agreement that title to the merchandise shall be retained by the seller until the full purchase price shall have been paid, which was also signed by the Bankrupt.

The fact that the spaces relating to down payments, monthly payments and the due dates were blank, does not affect the agreement that title shall remain in the seller until he shall have been paid in full for his merchandise.

When the Bankrupt signed the documents, he knew that there were blank spaces which were to be filled in when the prices, terms and other adjustments were ascertained.

It has been laid down generally that if one signs an instrument containing blank spaces, he intends them to be filled in by the person to whom it is delivered, and it is ordinarily presumed to give authority to the holder to fill in the blanks in accordance with the general character of the instrument.

6 Cal. Jur. p. 227;
13 Corp. Jur. p. 308;
Thomas vs. Fursman, 39 Cal. App. 278, 280;
Pacific Auto Exch. vs. Stansfield, 62 Cal. App. 577, 579;
Jenkins vs. Johnson, 175 Mo. App. 355; 162 S. W. 308.

By means of incompetent evidence, which was objected to by Appellant's counsel (objection overruled by Referee), the Appellee seeks to infer that the invoice was just a receipt—an acknowledgment of receipt (transcript record p. 47). Insofar as the title retention clause is concerned, this was a mere attempt to alter the terms of a written instrument.

Counsel for Appellee cites the case of *Avalon Products vs. Lentini,* 98 Cal. App. 2d, 177, 180, which holds that where the price of the commodity called for, but not delivered, is to be subsequently ascertained by the parties, the sale is incomplete and unenforceable until the price is fixed or agreed upon. Under this case, the bankrupt could not possibly get title to the goods, and the seller would thereby be entitled to possession of same. One cannot blow "hot and cold" at the same time.

Patterson vs. Reed, 132 Cal. App. 454, cited by Appellee is nowhere near in point. In that case the Court held that the purported agreement of sale was not a contract as the plaintiff never accepted the offer of the defendant.

We have no quarrel with the other cases cited in Appellee's brief. They do not decide any of the pertinent issues in this case.

It is therefore clear that the Trial Court failed to consider the title retention clause on the invoice in deciding this case. Certainly, there was no adequate evidence in the record to support his Finding of Fact No. IX, that there was no agreement between the Petitioner and the Bankrupt by which title to the personal property was to be retained by said Petitioner (transcript record p. 22); and his Conclusion of Law No. II, that there is no contract in existence by which title was retained through the personal property in question by the Petitioner (transcript record p. 23).

We therefore respectfully submit that in light of the errors pointed out in our opening brief and in this reply brief, the Order of the District Court in this proceeding should be reversed.

Respectfully submitted,

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and
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